

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DRUT TECHNOLOGIES, INC.,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendants.

No. 2:21-cv-01653-BJR

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
MICROSOFT’S MOTION TO DISMISS

I. INTRODUCTION

Before the Court is Defendant Microsoft Corporation’s (“Microsoft”) motion to partially dismiss Plaintiff’s Complaint (“Motion” or “Mot.,” Dkt. 16) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff Drut Technologies, Inc. (“Drut”) opposes the Motion. Having reviewed the pleadings, the record of the case, and the relevant legal authorities, the Court GRANTS the Motion in part, and DENIES it in part. The Court’s reasoning is set forth below.

II. FACTUAL BACKGROUND¹

This dispute arises from a supplier agreement between Microsoft and Drut, a company that had, prior to the events at issue in this case, developed certain technology for use in cloud-based servers.² Compl. ¶¶ 3-5. On November 20, 2019, Drut and Microsoft entered into a Master

¹ The facts recited below are taken from Plaintiff’s Complaint (“Compl.,” Dkt 1). For the purposes of the present motion, the Court takes the factual allegations in the Complaint as true.

² Drut designed a set of computer algorithms, and a configuration of software and hardware components, that allows cloud-based resources to be disaggregated so to improve servers’ efficiency. Compl. ¶¶ 3-5.

Supplier Services Agreement (“MSSA”), pursuant to which Microsoft engaged Drut in a project in which Drut was to refine its developed technology and apply it to Microsoft’s Azure server network (the “Project”). *Id.* ¶¶ 15, 47; Declaration of Brian Tuttle (“Tuttle Decl.,” Dkt. 1), Ex. B (MSSA). Under the MSSA, Drut was to provide Microsoft several deliverables that were defined in a separate Statement of Work (“SOW”). Tuttle Decl., Ex C (SOW). The SOW divides the deliverables into five separate “milestones” and, for each milestone, provides for a specific delivery date and payment amount. Compl. ¶¶ 62-63; SOW at 2-7.

Section 3 of the MSSA provides that “[e]ach party will own and retain all rights to its pre-existing IP and any IP developed independently of Services performed under this Agreement.” Compl. ¶ 58; MSSA at 6 § 3(a). Section 3 also contains a provision granting Microsoft a license to materials incorporated into Drut’s deliverables. It provides:

If Supplier Materials are incorporated into Deliverables or are necessary for the use or distribution of Deliverables by Microsoft or any third-party, then Supplier will continue to own the Supplier Materials, including any Supplier IP therein (“Retained IP”). Unless the parties agree on written license terms, Supplier grants Microsoft and its Affiliates a ***worldwide, nonexclusive, perpetual, irrevocable, royalty-free, fully paid-up right and license***, under all current and future Retained IP, to

- a. make, use, reproduce, format, modify, and create derivative works of the applicable Supplier Materials,
- b. publicly perform or display, import, broadcast, transmit, distribute, license, offer to sell and sell, rent, lease, or lend copies of the applicable Supplier Materials and derivative works thereof,
- c. combine the Supplier Materials and derivative works thereof with any software, firmware, hardware, or services, ...

MSSA at 7-8 § 3(c)(2) (emphasis added).

Finally, Microsoft and Drut had entered into a Non-Disclosure Agreement (the “NDA”) in April 2019, prior to executing the MSSA. Compl. ¶ 98; Tuttle Decl., Ex. A (NDA). That agreement is incorporated into the MSSA, which provides that “[i]nformation shared under the

1 [MSSA] is Confidential Information and subject to the NDA.” MSSA at 10 § 6(a)(1). The MSSA
2 further requires the parties to “hold in strictest confidence and not use or disclose to any third-
3 party any Confidential Information of the other party.” Compl. ¶¶ 61, 110; MSSA at 10 § 6.

4 Drut alleges that, from February to April 2020, following its completion of Milestone 1,
5 Microsoft imposed additional and costly requirements for the deliverables that delayed and
6 hindered Drut’s completion of the milestones. Compl. ¶¶ 70-88. Despite Drut’s completion of
7 Milestone 2 in late April 2020, Microsoft, which had by then adopted a “hostile” and
8 “noncooperative” approach to the Project, refused to pay for those deliverables unless the parties
9 amended the SOW. *Id.* ¶¶ 68-69, 94-96. The parties did so by executing a Change Order on April
10 24, 2020 that modified the work required for Milestones 2 through 5, and also required Drut to
11 provide Microsoft with access to its source code and other proprietary technology. *Id.* ¶¶ 97-98,
12 100; Tuttle Decl., Ex. 4 (Change Order).³ To that end, Drut sent Microsoft a physical device that
13 demonstrated Drut’s developed software and hardware configuration. Compl. ¶ 115.

16 According to Drut, it eventually completed the remaining milestones by June 2020.
17 Compl. ¶ 103. Microsoft, however, despite having previously represented that it would make
18 payment for them, notified Drut on July 17, 2020 that it would not do so because Drut had missed
19 milestone deadlines and failed to provide completed deliverables. *Id.* ¶¶ 104-05.

20 Drut alleges that Microsoft, having received Drut’s proprietary information pursuant to the
21 Change Order (Compl. ¶¶ 112-15), began to develop its own server using Drut’s technology. *Id.*
22 ¶ 117. In September 2020, Microsoft posted a video onto YouTube that showed Microsoft’s Chief
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24
25 ³ Copies of the MSSA, the NDA, the SOW, and the Change Order were submitted by Microsoft with its Motion.
26 Given the extent to which the Complaint and the claims asserted therein rely on those documents, and in the absence
of any dispute as to their authenticity, the Court deems them incorporated by reference into the Complaint. *See*
Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006).

Technology Officer for Azure presenting, as an “Azure Server,” a server architecture that used the “exact configuration” as the device that Drut had earlier provided to Microsoft. *Id.* ¶¶ 120-136.

Plaintiff commenced this lawsuit on December 10, 2021, asserting the following claims against Microsoft: (1) claims for declaratory relief; (2) trade secret misappropriation in violation of federal and Washington state law; (3) breach of contract; (4) breach of the implied covenant of good faith and fair dealing; (5) conversion; (6) unjust enrichment; (7) quantum meruit; and (8) violation of Washington’s Consumer Protection Act. Microsoft filed the Motion on February 1, 2022, Drut filed an opposition brief on March 7, 2022 (“Opposition” or “Opp.,” Dkt. 26), and Microsoft filed a reply brief on March 21, 2022 (“Reply” or “Rep.,” Dkt. 27).

III. DISCUSSION

In the Motion, which this Court construes as a partial motion to dismiss, Microsoft seeks dismissal of the majority of Drut’s claims against it. As noted in further detail below, Microsoft does not seek dismissal of one of Drut’s declaratory judgment claims, Drut’s entire quantum meruit claim, or Drut’s claims for unjust enrichment, breach of contract, and breach of the implied covenant of good faith and fair dealing that are premised on Microsoft’s alleged failure to pay for completed deliverables. *See generally* Mot. As for the claims that Microsoft does move to dismiss, the Court reviews them in turn.

A. Legal Standard

A motion to dismiss for failure to state a claim under Rule 12(b)(6) is properly granted if the complaint does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

1 “A complaint may fail to show a right to relief either by lacking a cognizable legal theory or by
2 lacking sufficient facts alleged under a cognizable legal theory.” *Woods v. U.S. Bank N.A.*, 831
3 F.3d 1159, 1162 (9th Cir. 2016). When considering a motion to dismiss under Rule 12(b)(6),
4 courts must accept the factual allegations in the complaint as true and construe such allegations in
5 the light most favorable to the plaintiff. *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 886-
6 87 (9th Cir. 2018).

8 **B. Drut’s Claim for Declaratory Relief**

9 Drut seeks a declaration from this Court that “Microsoft’s failure to pay Drut for
10 Milestones 3 through 5 negates any right to the license contemplated in Section 3(c)(2) of the
11 MSSA.” Compl. ¶ 147. In its Motion, Microsoft contends that Drut is not entitled to this
12 declaration because the license granted by the MSSA is “irrevocable [and] cannot be invalidated.”
13 Mot at 5-9.⁴ Microsoft is correct.

15 **1. Whether the Parties Agreed to a License**

16 The parties dispute whether the MSSA contains a license agreement in the first instance.
17 As noted above, Section 3 of the MSSA provides that, “[u]nless the parties agree on written license
18 terms,” Drut grants to Microsoft a license to use and disclose the technology provided within the
19 scope of the Project. MSSA at 7-8 § 3(c)(2). In support of its argument that the MSSA never
20 granted a license to Microsoft, Drut points to the qualifying phrase, “[u]nless the parties agree on
21 written license terms” (MSSA § 3(a)), and a provision in Section 12 stating that the MSSA “does
22 not replace any separate written license agreement between Microsoft and [Drut]” (MSSA at 19 §
23

25 ⁴ Drut also seeks a declaration that “the obligations set forth in the [Change Order] do not bind Drut because the
26 [Change Order] was not supported by valid consideration or was the product of undue influence, coercion, or other
improper means.” Compl. ¶ 147. As Microsoft never specifically addresses that claim, the Court does not construe
the Motion as seeking its dismissal.

1 12(h)). According to Drut, these provisions “reflect[] that the parties contemplated entering into
2 a separate license agreement.” Opp. at 4.

3 At best, these provisions permit the parties to enter into a separate licensing agreement that,
4 if executed, would supersede the license agreement in Section 3. They do not, as Drut contends,
5 demonstrate that the parties were *required* to enter into a separate agreement or that the license
6 agreement already contained in the MSSA was somehow no longer in effect. As the Complaint
7 does not allege that the parties agreed in writing to any other license terms, Drut fails to show that
8 the license agreement contained in Section 3 was, by the MSSA’s own terms, replaced or rendered
9 inoperative.
10

11 Drut also contends that the MSSA is ambiguous as to whether it granted a license, and
12 extrinsic evidence would confirm that no license was intended. Opp. at 4. Drut points specifically
13 to allegations in the Complaint that the parties’ representatives discussed and evinced an
14 understanding “that a subsequent, royalty-bearing license was needed and would be negotiated.”
15 *Id.* at 4-5 (quoting Compl. ¶ 59). Drut is correct that Washington law “permits the court to examine
16 extrinsic evidence to determine whether a contract is ambiguous” (*id.* at 4 (citing, *inter alia*, *Berg*
17 *v. Hudesman*, 115 Wash. 2d 657 (Wn. Sup. Ct. 1990))), however such evidence “is not admissible
18 for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the
19 absence of fraud, accident, or mistake.” *Berg*, 115 Wash. 2d at 669 (citation omitted); *see*
20 *Wilkinson v. Chiwawa Communities Ass’n*, 180 Wash. 2d 241, 251 (Wn. Sup. Ct. 2014) (“We []
21 do not consider extrinsic [e]vidence that would vary, contradict or modify the written word”
22 (quotation marks and citation omitted)).
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25 The license agreement contained in Section 3 of the MSSA provides that, “unless the
26 parties agree on written license terms, [Drut] grants Microsoft and its Affiliates a ... right and

1 license” to Drut’s technology. MSSA at 7-8 § 3(c)(2)). The Court does not find that this language
2 is ambiguous. By Section 3’s clear terms, and in the absence of a separate written license
3 agreement, Drut unambiguously conveyed a license to Microsoft. Further, the extrinsic evidence
4 Drut asks this Court to consider – allegations that the parties understood that the MSSA would not
5 convey a license to Microsoft – flatly contradicts the MSSA’s clear language providing that it
6 does. As such, this Court will not consider it in determining whether a license agreement exists.
7

8 Finally, Drut argues that, contrary to the MSSA stating that the license was “fully paid-up”
9 (*see* MSSA at 7-8 § 3(c)(2)), Microsoft never actually paid a separate license fee, thereby rendering
10 any promise for a license illusory for lack of consideration. *Opp.* at 3-4. It is, however, “[a] basic
11 principle of contract law [] that consideration sufficient to support one promise is sufficient to
12 support any number of promises, and each written term of a contract need not be bargained for.”
13 *Smith v. W. Coast Marine Cleaning, Inc.*, 98 Wash. App. 1057 (Wn. Ct. App. 2000) (quoting
14 *Millican of Washington, Inc. v. Wienker Carpet Serv., Inc.*, 44 Wash. App. 409, 413 (Wn. Ct. App.
15 1986)). Consistent with this principle, Microsoft’s payment obligations under the MSSA –
16 amounting to \$1,500,000 in total – constitutes consideration sufficient to support Drut’s promise
17 to grant Microsoft the license.
18

19 Accordingly, Section 3 of the MSSA sets forth a valid license agreement between Drut and
20 Microsoft.
21

22 **2. Whether the License Was Invalidated by Microsoft’s Alleged Breach**
23 **of the MSSA**

24 Drut contends that even if the parties entered into a license agreement, that agreement was
25 invalidated when Microsoft breached the MSSA by failing to pay Drut for Milestones 3 through
26 5. The Court agrees with Microsoft that the license was not invalidated as Drut contends.

1 Drut conveyed to Microsoft a “worldwide, nonexclusive, perpetual, irrevocable, royalty-
2 free, fully paid-up right and license” to Drut’s technology. MSSA at 7-8 § 3(c)(2). In *Nano-*
3 *Proprietary, Inc. v. Canon, Inc.*, 537 F.3d 394 (5th Cir. 2008), the Fifth Circuit examined nearly
4 identical language in a license agreement granting the defendants an “irrevocable” license to the
5 plaintiff’s patents. The court rejected the plaintiff’s argument that the defendant’s material breach
6 of that agreement resulted in the license’s termination, finding instead that, “[b]ased upon the
7 unambiguous meaning of ‘irrevocable,’ ... the [license agreement] could not be terminated,
8 notwithstanding a material breach of the agreement.” *Id.* at 400. Otherwise, that term “would be
9 rendered superfluous, in contravention of established rules of contract interpretation.” *Id.*

11 This Court finds the reasoning in *Nano-Proprietary* persuasive and consistent with many
12 other courts, including one in this district applying Washington law. *See Timeline, Inc. v.*
13 *Proclarity Corp.*, No. 05-cv-1013, 2007 WL 1574069, *4 (W.D. Wash. May 29, 2007) (finding,
14 under Washington law, that the “irrevocable” license could “not be revoked under any
15 circumstances, even if there is a material breach of the agreement”); *State St. Glob. Advisors Tr.*
16 *Co. v. Visbal*, 431 F. Supp. 3d 322, 356 (S.D.N.Y. 2020) (“Defendant has plausibly alleged a claim
17 for breach of the Agreements, but this cannot serve as a basis for rescission because the license is
18 irrevocable.”); *Bennett v. Am. Online, Inc.*, No. 06-cv-13221, 2007 WL 2875169, at *14 (E.D.
19 Mich. Sept. 28, 2007) (material breach of terms of service agreement did not result in termination
20 of “irrevocable, perpetual right to ‘use’ the software”); *Matter of Provider Meds, L.L.C.*, 907 F.3d
21 845, 856 (5th Cir. 2018) (“the use of ‘irrevocable’ ... indicates that the license may not be revoked
22 for any reason, even a breach by the other side”). As such, the Court comes to the same conclusion
23 here. Drut’s argument that Microsoft’s breach of the MSSA invalidated the license “would give
24 no effect to the term ‘irrevocable.’” *See State St. Glob. Advisors*, 431 F. Supp. 3d at 357. By

1 expressly describing the license as “irrevocable,” the parties contemplated that the license could
2 not be revoked under any circumstances.

3 It is true that the contract breaches at issue in *Nano-Proprietary* – and in nearly all of
4 Microsoft’s cited authority on this point – did not deal, as is the situation here, with a party’s failure
5 to make payments due under the contract. This distinction, however, does not change the result.
6 The MSSA does not contain any language indicating that full payment was a condition precedent
7 to Drut’s granting of an irrevocable license. *See Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 559
8 n.7 (9th Cir. 1990) (contract language did not “support a conclusion that full payment was a
9 condition precedent to” defendant’s use of licensed work); *see also Northwood Est., LLC v. Lennar*
10 *Nw., Inc.*, 12 Wash. App. 2d 1038 (Wn. Ct. App. 2020) (“[W]ords such as ‘provided that,’ ‘on
11 condition,’ ‘when,’ ‘so that,’ ‘while,’ ‘as soon as,’ and ‘after’ suggest a conditional intent, not a
12 promise.” (citation omitted)). Absent such terms, Microsoft’s failure to pay all amounts due under
13 the MSSA, while certainly giving rise to a contractual claim for damages, does not effect a
14 rescission of the license. *See Powlus v. Chelsey Direct, LLC*, No. 09-cv-10461, 2011 WL 135822,
15 at *6 (S.D.N.Y. Jan. 10, 2011) (contract’s grant of “irrevocable” license was “inconsistent with an
16 intended right to rescind for non-payment”); *cf. Fraunhofer-Gesellschaft zur Forderung der*
17 *Angewandten Forschung E.V. v. Sirius XM Radio Inc.*, 940 F.3d 1372, 1381 (Fed. Cir. 2019)
18 (finding contract ambiguous on whether irrevocable license survived its termination where it stated
19 that termination would not affect license rights provided that licensee paid all amounts due).

20 This construction is moreover consistent with the nature of a technology license and the
21 parties’ alleged business dealings. “Often a license is of such critical value to an enterprise or an
22 undertaking that the prospective licensee may seek to make the license irrevocable despite
23 nonpayment or other material breach.” Roger M. Milgrim, *Milgrim on Licensing* § 27.02 (2022)

1 (noting that the simplest way of achieving irrevocability is “to simply provide that: The license
2 conferred under this Agreement shall be perpetual and irrevocable.”). Microsoft’s incorporation
3 of Drut’s technology into its servers, in reliance upon the license agreement, would be at odds with
4 a license that could be invalidated, rendering Microsoft’s servers unusable.

5 Finally, the Court does not find persuasive Drut’s argument that an irrevocable license is
6 inconsistent with Section 5(c)(1) of the MSSA, which provides that “[e]ither party may
7 immediately terminate this Agreement on written notice of a breach of” Section 6’s confidentiality
8 provisions. Opp. at 3 (citing MSSA at 10 §§ 5(c)(1), 6(a)). According to Drut, its termination
9 right would be meaningless if Microsoft had a temporally unlimited license to its technology. *Id.*
10 The MSSA, however, contains a Survival clause providing that “[t]he provisions of this Agreement
11 which ... have application to events that may occur after the termination or expiration of this
12 Agreement [] will survive such termination or expiration.” MSSA at 10 § 5(e). The parties’ use
13 of the term “irrevocable” in describing the granted license demonstrates that it was, consistent with
14 the Survival clause, intended to survive the MSSA’s termination. While other provisions could
15 certainly be terminated, the license could not.

16 In sum, the MSSA expressly granted Microsoft an irrevocable license that remains valid
17 notwithstanding Microsoft’s alleged breach of that agreement. Drut is therefore not entitled to a
18 declaration that Microsoft’s failure to pay for Milestones 3 through 5 negates its right to that
19 license.

20 **C. Drut’s Claim for Trade Secret Misappropriation**

21 Drut asserts claims for trade secret misappropriation under the federal Defend Trade
22 Secrets Act, 18 U.S.C. § 1836, and the Uniform Trade Secrets Act, as codified in Washington law
23 at RCW § 19.108.030 *et seq.* Compl. ¶¶ 148-195. Drut premises its claims on its allegations that

1 Microsoft used Drut’s proprietary hardware and software configurations, without authorization, to
2 further develop the Azure server network. *Id.* Microsoft counters that these claims fail “because
3 Microsoft held a license to the information Drut now claims as a trade secret.” Mot. at 10-11.

4 Assuming that the Complaint adequately alleges that the technology at issue was
5 protectable trade secret – which Microsoft does not dispute (*see* Rep. at 9) – Drut still does not
6 plead that Microsoft unlawfully misappropriated it. Trade secret misappropriation can be
7 committed through (1) the “[a]cquisition of a trade secret of another by a person who knows or
8 has reason to know that the trade secret was acquired by improper means,” or (2) under certain
9 circumstances, by the “[d]isclosure or use of a trade secret of another without express or implied
10 consent....” 18 U.S.C. § 1839(5); RCW § 19.108.010. The Complaint pleads neither type.

11 Drut’s claim that Microsoft committed trade secret misappropriation through the first type
12 – *i.e.*, acquiring it “by improper means” – is based on its allegation that that Microsoft “insisted
13 that Drut must provide its source code in order to receive a milestone payment that was already
14 due and payable.” Opp. 12. In other words, Drut claims that Microsoft’s acquisition of its
15 technology was improper because it was accomplished by coercing Drut to execute and then
16 comply with the Change Order. “Improper means,” however, is defined under both the federal
17 and state statutes to include “theft, bribery, misrepresentation, breach or inducement of a breach
18 of a duty to maintain secrecy, or espionage through electronic or other means.” 18 U.S.C. §
19 1839(6)(a); RCW § 19.108.010(1). Drut does not allege that Microsoft’s acquisition was
20 accomplished through any of these means.⁵ Moreover, Drut does not point to any authority
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25 ⁵ While Drut alleges that Microsoft “affirmatively misrepresent[ed] that Microsoft was not using Drut’s trade secrets
26 because it was made on July 17, 2020, after the alleged acquisition. Compl. ¶¶ 118-19. Further, while Drut alleges
that Microsoft breached the MSSA’s confidentiality provisions, that breach relates to Microsoft’s alleged use and
disclosure of Drut’s trade secret, and not its acquisition. *See infra* at 13.

1 supporting a misappropriation claim, like the one it asserts here, based on a party's knowing and
2 deliberate provision of its technology to a business partner pursuant to its contractual obligations.
3 *Cf. Glacier Water Co., LLC v. Earl*, No. 08-cv-1705, 2010 WL 5071258, at *4 (W.D. Wash. Dec.
4 7, 2010) (rejecting claim because plaintiffs "voluntarily disclosed" the trade secret to business
5 partner); *MEECO Mfg. Co. v. Imperial Mfg. Grp.*, No. 03-cv-3061, 2005 WL 8172680, at *4 (W.D.
6 Wash. May 26, 2005) (same).

7
8 Drut's second claim – that Microsoft disclosed and used its trade secret "without express
9 or implied consent" – is based on Drut's allegations that Microsoft used Drut's technology to
10 develop its Azure server, and then disclosed it on YouTube. *See Opp.* at 13. As discussed above,
11 however, the MSSA granted Microsoft a license to, among other things, "use," "create derivative
12 works of," and "publicly perform or display" any materials "incorporated into Deliverables or []
13 necessary for the use or distribution of Deliverables." MSSA at 7-8 § 3(c)(2). Drut, notably, does
14 not dispute that its technology constituted such materials. *See Rep.* at n.5. Therefore, Microsoft's
15 alleged use and disclosure of Drut's technology was expressly authorized by the MSSA, and was
16 thereby done with Drut's consent.

17
18 Accordingly, Drut's claim for trade secret misappropriation fail.

19 **D. Drut's Claims for Conversion and Unjust Enrichment**

20 Drut asserts a conversion claim (Compl. ¶¶ 244-49) and an unjust enrichment claim (*id.* ¶¶
21 235-43) that are premised on the same allegations and theory as its trade secret misappropriation
22 claim. A separate part of Drut's unjust enrichment claim is premised on Microsoft's alleged refusal
23 to pay Drut for the additional project work it performed (*see* Compl. ¶¶ 235-43), but Microsoft
24 does not seek to dismiss that aspect of the claim. *See Mot.* at 10-11.
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26

Drut does not separately address its conversion claim, and its unjust enrichment claim premised on Microsoft's alleged misuse of Drut's technology, in opposing the Motion. Instead, Drut relies on its trade secret misappropriation arguments to support those claims. *See* Opp. at 6, 10. Given that Microsoft held an irrevocable license to Drut's technology, the claims are not viable.

E. Drut's Breach of Contract Claim

Microsoft moves to dismiss Drut's claim that it breached two provisions of the MSSA: (1) Section 3(a) of the MSSA (*id.* ¶ 202(i)); and (2) the confidentiality provisions contained in Section 6(a) of the MSSA (Compl. ¶¶ 206-14). Microsoft contends, correctly, that these claims fail because they "assume[] that Microsoft misappropriated Drut's trade secrets." Mot. at 11-12.

Drut asserts that Microsoft breached Section 3 by "[m]isusing Drut's trade secrets ... despite the clear text of the MSSA in Section 3(a) that Drut continued to own its pre-existing IP and that any license to Microsoft would be the subject of a future agreement." Compl. ¶ 202(i). As discussed above, however, the license agreement contained in that same section remains the operative agreement (*see supra* at § III(B)), and it authorized Microsoft to use and create derivative works of the technology Drut incorporated into its deliverables (*see supra* at 11). The Complaint therefore does not establish a breach of Section 3.

Similarly, Drut claims that Microsoft breached Section 6(a) – which prohibits the parties from "us[ing] or disclos[ing] to any third-party any Confidential Information" (MSSA at 10 § 6(a)(2); *see* NDA at 2 § 3(a)) – by using Drut's technology to develop its Azure server. Compl. ¶¶ 206-14. Section 6(a), however, is subject to the NDA (*see* MSSA at 10 § 6(a)(1)), and the NDA expressly permits the use of information that was known by Microsoft "without an obligation to keep it confidential." NDA at 1 § 2(b). As discussed above, under the MSSA, Microsoft was

1 authorized to use and display the technology it received from Drut. *See supra* at 12. Microsoft's
 2 alleged use of Drut's technology therefore falls outside the scope of, and was permitted by, the
 3 NDA. Accordingly, the Complaint does not establish a breach of Section 6(a).

4 **F. Drut's Claim that Microsoft Breached the Implied Covenant of Good Faith**
 5 **and Fair Dealing**

6 Drut claims that Microsoft breached the implied covenant of good faith and fair dealing in
 7 numerous respects. Compl. ¶¶ 215-224. As Drut points out (Opp. at 8-9), and as Microsoft's
 8 Reply does not dispute, the Motion does not specifically address the majority of Microsoft's
 9 alleged breaches. Specifically, the Motion does not address Drut's claim that Microsoft breached
 10 the covenant by: (1) frustrating Drut's work on the Project by refusing to cooperate in developing
 11 deliverable "specifications" (Compl. ¶ 218); (2) imposing material changes to the deliverables that
 12 rendered the milestone deadlines impossible to attain (*id.* ¶ 219); (3) withholding payments in
 13 order to gain access to Drut's technology (*id.* ¶ 220); and (4) requiring Drut to postpone the
 14 submission of invoices and then refusing to pay them because of their purported delay (*id.* ¶ 223).
 15 Drut's claim, therefore, survives in those respects.

16
 17 The Motion does address, on the other hand, Drut's claim that Microsoft breached the
 18 covenant by (1) "engag[ing] in a pattern of subversion to ... usurp[] Drut's intellectual property
 19 and trade secrets" (Compl. ¶ 217), and (2) "making lulling statements to Drut about a separate
 20 license" (*id.* ¶ 222). Those alleged acts, however, cannot serve as the basis for this claim.

21
 22 "The implied duty of good faith and fair dealing protects a party's justified expectations in
 23 entering the agreement." *134th Street Lofts, LLC v. iCap Northwest Opportunity Fund, LLC*, 15
 24 Wash. App. 2d 549, 566 (Wn. Ct. App. 2020). The duty, however, "cannot contradict express
 25 terms in a contract," nor can it be used to "interpret[] ... contractual provisions in a manner that
 26 expands the scope of their plain meaning." *Id.* at 564-65. Drut's claim that Microsoft breached

1 the covenant through its unauthorized use of Drut’s technology fails because it seeks to impose a
2 duty on Microsoft – *i.e.*, to refrain from using the technology – that contradicts the MSSA’s express
3 authorization of such use. *See supra* at 12. Similarly, Drut’s claim that Microsoft acted in bad
4 faith by making statements about a separate license fails because it is premised on a purported duty
5 – *i.e.*, to negotiate a separate license – that is not situated in the parties’ agreements. *See supra* at
6 § III(B)(1); *see also Johnson v. Yousoofian*, 84 Wn. App. 755, 762 (Wn. Ct. App. 1996) (“If there
7 is no contractual duty, there is nothing that must be performed in good faith.”). Accordingly,
8 Drut’s claim that Microsoft breached the implied covenant of good faith and fair dealing fails in
9 these two respects.
10

11 **G. Drut’s Claim for Violation of Washington’s Consumer Protection Act**

12 Drut claims that Microsoft violated Washington’s Consumer Protection Act (“CPA”),
13 RCW 19.86.010 *et seq.*, by “(1) including Drut’s software in its cloud-based operating system,”
14 and “(2) failing to ... respect[] the confidentiality of Drut’s trade secret and confidential
15 information.” Compl. ¶ 226. To prevail on a CPA claim, “the plaintiff must prove (1) an unfair
16 or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest,
17 (4) injury to a person’s business or property, and (5) causation.” *Panag v. Farmers Ins. Co. of*
18 *Washington*, 166 Wash. 2d 27, 37 (Wn. Sup. Ct. 2009). Microsoft contends that the Complaint
19 fails to plead the first and third elements. Mot. at 14-15.
20

21 In order to establish “an unfair or deceptive act or practice,” the plaintiff “need not show
22 the act in question was intended to deceive, only that it had the capacity to deceive a substantial
23 portion of the public.” *Panag*, 166 Wash. 2d at 47. “[T]here must be shown a real and substantial
24 potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive
25 act’s being repeated.” *McClellon v. Citigroup Glob. Markets, Inc.*, No. 18-cv-978, 2018 WL
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5808440, at *4 (W.D. Wash. Nov. 6, 2018) (citation omitted). While Drut’s allegations concerning Microsoft’s “pattern of ... seeking to obtain intellectual property rights for nominal payments” are minimal (*see* Compl. ¶ 21), Drut is more specific in its Opposition about what it seeks to prove. In particular, in its brief, Drut elaborates that Microsoft employs clever contract drafting, threats of nonpayment, and aggressive project demands in the course its supply engagements with smaller technology companies to gain access to their intellectual property for little consideration. Opp. at 15; *see id.* at 12-13. The Court finds that this alleged course of conduct – which the Complaint adequately alleges in relation to Drut – constitutes an unfair or deceptive practice, and is capable of being repeated towards similar situated companies. *See, e.g., State v. Kaiser*, 161 Wash. App. 705, 722 (Wn. Ct. App. 2011) (defendants’ practices inducing property owners to enter agreements through misrepresentations, and burying information in agreements, violated the CPA); *Anderson v. Valley Quality Homes, Inc.*, 84 Wash. App. 511, 523 (Wn. Ct. App. 1997) (finding CPA violation where defendant induced sales and then “used a contract clause to place on them the responsibility for any future problems”).

The Court also finds that Drut has adequately pled the “public interest” element of a CPA claim. A dispute between private parties “has a public interest impact where there is a ‘likelihood that additional plaintiffs have been or will be injured in exactly the same fashion.’” *Beacon Plumbing & Mech. Inc v. Sposari Inc*, No. 15-cv-1613, 2016 WL 5795282, at *4 (W.D. Wash. Mar. 17, 2016) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 790 (Wn. Sup. Ct. 1986)). While, as noted above, Drut’s “pattern” allegations are minimal, Drut alleges conduct that can plausibly be shown to injure other small technology companies in the same fashion, and therefore implicates a public interest impact. Drut “should have the opportunity to develop evidence to support this claim.” *Birkholm v. Washington Mut. Bank, F.A.*,

1 447 F. Supp. 2d 1158, 1165-66 (W.D. Wash. 2006) (declining to dismiss CPA claim even though
2 plaintiff’s “argument that the conduct at issue in this case affects the public interest because the
3 conduct is capable of repetition is weak at best”).

4 Accordingly, Drut has adequately pled the first and third elements of a CPA claim. The
5 Court therefore declines to dismiss Drut’s claim.

6 **H. Drut’s Claim for Extra-Contractual Damages**

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8 Microsoft seeks to “dismiss Drut’s request for an ‘[a]ward ... [of] compensatory,
9 consequential, exemplary, punitive, and multiple damages on all claims’ as barred by the MSSA.”
10 Mot. at 15 (quoting Compl. at 45). Microsoft contends that such damages are precluded by Section
11 9 of the MSSA, which provides that “neither party will be liable to the other for any consequential
12 special, exemplary, or punitive damages ... arising out of this agreement,” unless the party
13 breached, among other obligations, its “confidentiality ... obligations under this agreement.”
14 MSSA at 15 § 9(a)-(b) (capitalization removed). Drut does not respond to this argument in its
15 Opposition.
16

17 In light of Drut’s lack of response to Microsoft’s argument, and given this Court’s finding
18 that Drut has not pled that Microsoft breached its confidentiality obligations, the Court dismisses
19 Drut’s claim for consequential, exemplary, punitive, and multiple damages on its claims.
20 Nevertheless, the Court does not dismiss Drut’s claim for compensatory damages for any claims
21 on which Drut ultimately prevails. *See Inteum Co., LLC v. Nat’l Univ. of Singapore*, 371 F. Supp.
22 3d 864, 876 (W.D. Wash. 2019) (noting that “[e]xpectation damages are generally awarded for
23 breach of contract”); *Virginia Mason Med. Ctr. v. Exec. Risk Indem. Inc.*, 331 F. App’x 473, 474
24 (9th Cir. 2009) (noting that the CPA “provides compensatory damages for harm”). The MSSA
25 does not limit Drut’s entitlement to compensatory damages, *see* MSSA at 15 § 9(a)-(b), and while
26

1 Drut did not raise this argument in its Opposition, the Court finds that it would be unnecessarily
2 draconian to deem Drut to have waived it.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the Court GRANTS in part and DENIES in part Microsoft's
5 motion to dismiss the Complaint (Dkt. 16). The Court dismisses, with prejudice, Drut's claims for
6 trade secret misappropriation and conversion in their entirety, and Drut's claims for declaratory
7 relief, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust
8 enrichment, and extra-contractual damages only to the extent identified in this Order. The Court
9 declines to dismiss Drut's claim under Washington's Consumer Protection Act.
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11 SO ORDERED.

12 Dated: June 15, 2022

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15 _____
16 Barbara Jacobs Rothstein
17 U.S. District Court Judge
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